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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
	)	NPDES Appeal No. 03-09
Teck Cominco Alaska Incorporated Red Dog Mine	)	
	)	Region 10 Response
NPDES Permit No. AK-003865-2	)	to Petition for Review

I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19 and the August 28, 2003, letter from the Clerk of the Environmental Appeals Board ("EAB"), Region 10 of the U.S. Environmental Protection Agency ("Region 10" or "the Region") respectfully submits this response to the Petition for Review ("Petition") that the Kivalina Relocation Planning Committee ("Petitioner") filed on August 18, 2003. The Petition pertains to NPDES Permit No. AK-003865-3 ("the Permit"), and in particular, challenges a modification to Permit that Region 10 signed on July 17, 2003 ("the Permit Modification"). For the reasons set forth below, the EAB should deny the Petition.

II. BACKGROUND

A. The Facility - Red Dog Mine

The Permit authorizes wastewater discharges from Red Dog Mine ("the Mine"). The permit holder is Teck Cominco Alaska Incorporated ("Teck"),[1] which operates the Mine pursuant to a contract with NANA Regional Corporation.[2] Administrative Record, Document 26 at 5-6.[3] The Mine is located in a sparsely populated area of Northwestern Alaska in the DeLong Mountains, approximately 50 miles inland (east) from the Chukchi Sea. AR 15 at 1-2, AR 26 at 5. The nearest villages are Kivalina (approximately 50 miles to the southwest, population approximately 400), Noatak (approximately 30 miles to the south, population approximately 450), and Kotzebue (approximately 80 miles to the south, population approximately 3,000). Id. The vast majority of the local population consists of native Inupiaq (Eskimo) people.

Red Dog is an open pit mine that extracts lead and zinc from a surface ore body. The Mine facility also includes a mill that processes the ore into concentrate. AR 26 at 5-6. To store wastewater and tailings (the finely ground waste rock separated during processing), Teck created a tailings impoundment by constructing a dam near the mouth of the South Fork Red Dog Creek. AR 26 at 5-6. The Mine's wastewater becomes highly contaminated with metals through contact with the areas disturbed by mining, through use in the milling process, and through contact with the tailings in the impoundment. Prior to discharge, wastewater is treated to remove metals

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[1]Teck is the corporate successor to Cominco Alaska Incorporated, which began the mining operation and was the original NPDES permit holder.

[2]NANA Regional Corporation owns the underlying land and mineral rights. NANA, which originally stood for Northwest Arctic Native Association, is a regional corporation representing native Inupiat (Eskimo) people of the Northwest Arctic Borough in Northwestern Alaska. NANA was established under the Alaska Native Claims Settlement Act.

[3]Citations to documents in the administrative record shall be referenced as "AR ##," where ## is the document number in the Certified Index to the Administrative Record.

(primarily zinc, lead, iron and cadmium) using lime precipitation and sodium sulfide precipitation. AR 26 at 6, AR 15 at 1. This process introduces into the wastewater calcium and sulfate ions, which are constituents of total dissolved solids, or TDS, as explained further below. AR 15 at 1, 12.

B. Receiving Waters

The Mine is located near the headwaters of the Red Dog Creek system, which includes the South Fork, Middle Fork, North Fork, and Main Stem of Red Dog Creek. AR 15 at 9, AR 51 Appendix C, AR 26 Appendix B (map). The South Fork has been impounded in the tailings impoundment. Id. The Middle Fork historically flowed directly across the surface deposit that is being mined, and as a result had very high metals concentrations in its natural condition. AR 3. The mine discharges its treated wastewater to the Middle Fork Red Dog Creek downstream of the mine pit.[4] Approximately 1-1/2 miles downstream of the outfall, the Middle Fork and North Fork converge and become the Main Stem. Main Stem Red Dog Creek is a tributary of Ikalukrok Creek, which ultimately enters the Wulik River. AR 15 at 9-12. The Wulik River is a sizeable river that flows into the Chukchi Sea near the Native Village of Kivalina. Id.

Because of natural ore bodies present in the vicinity of the Mine, including the one presently being mined, some water bodies in the vicinity had very high natural metals concentrations. As a result, not all of the area water bodies supported aquatic life, and therefore the designated uses differ among various stream segments near the Mine. AR 15 at 4 (Table 1). Six species of fish have been observed in the Red Dog and Ikalukrok Creek systems. AR 15 at 14-15 (distribution summarized at 15, Table 4). None have ever been observed in the Middle

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[4]Discharge only occurs only when the surface waters are not frozen, typically mid-May through mid-October. AR 15 at 9, AR 61 at 7-8.

Fork, due to high natural metals levels resulting from the surface ore deposit through which it flowed. AR 3. Spawning occurs downstream of the Mine's outfall at certain times and locations. AR 15 at 4, 22; AR 51 Appendix B. The contested issues in this permit appeal generally pertain to the effects of the Mine's effluent on fish spawning.

C. Total Dissolved Solids (TDS)

The focus of the Permit Modification, and this appeal, is the effluent limits and monitoring requirements for Total Dissolved Solids (TDS). AR 26 at 1. TDS consists of inorganic salts and small amounts of organic matter dissolved in water. Id. at 5. The principal constituents of TDS are carbonates, chlorides, sulfates, potassium, magnesium, calcium, and sodium. Id. Most of these ions are typically found in natural waters but at lower concentrations than those found in Mainstem Red Dog Creek after discharge. AR 15 at 12.

As noted above, the process of removing metals contamination from the Mine's wastewater involves the addition of calcium and sulfate ions, which are two of the constituents of TDS. Part II.A supra, AR 15 at 1, 12. The concentrations and quantities of TDS discharged by the Mine do not cause TDS levels that exceed human health criteria in any of the receiving waters that are used as human drinking water sources. AR 26 at 5, A-3 to A-3. The effluent limits for TDS in the Permit Modification are driven by water quality criteria that protect aquatic life in the receiving waters. AR 26 at 6-8, Appendix C.

A number of laboratory studies have examined the effects of TDS on aquatic species. AR 10, AR 58 at 10-13, AR 26 at A-3 to A-4, AR 15 at 19-23. In addition, numerous field observations have examined aquatic life communities in the receiving waters near the Mine in an effort to observe changes in those communities as a result of the Mine's wastewater discharge. AR 55, 1, 4, 7, 9, 12, 16, 21, 35, 49, 50, 54.

EPA thoroughly reviewed, analyzed, and considered a wide range of studies, and all available field observations, relevant to the effects of TDS on aquatic life in the receiving waters affected by the Mine's wastewater discharges. See, e.g., AR 55, AR 15 at 19-29. Based on that review and analysis, the Region concluded that TDS levels at or below 1,500 mg/l are protective of all aquatic life species and life stages present in the waters affected by the Mine's discharge, except for fertilization in certain fish species. AR 5, AR 15 at 19-29. For fish fertilization, the Region concluded that the available evidence suggests that none of the species present in the waters affected by the Mine's discharges suffer significant adverse effects on fertilization when in-stream TDS concentrations are at or below 500 mg/l. AR 55.

D. Regulatory History

The Permit, as issued in 1998, contained an effluent limit that was based on the Alaska water quality criterion for TDS that was in effect at the time of issuance. That criterion provided that TDS was not to exceed "1/3 above background levels" where aquatic life was a designated use. Based on that criterion and the natural background levels of TDS in Red Dog Creek, the Permit limited the TDS concentration in the Mine's effluent to 196 mg/l.[5]

Because of (1) the quantity of wastewater that the Mine needed to discharge in order to maintain the integrity of the tailings impoundment dam, (2) the concentration of various metals in the tailings impoundment water, (3) the Permit's effluent limits for metals, and (4) the treatment technology available to remove metals from the wastewater, the Mine was unable to meet the TDS limits in the Permit. AR 15 at 1. The Region issued several compliance orders under § 309(a) of the Clean Water Act ("CWA") requiring the Mine to come into compliance

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[5]The Permit's effluent limit of 196 mg/l was for the daily maximum. The Permit also limited the monthly average TDS concentration in the Mine's effluent to 176 mg/l.

with the TDS limit, and in the interim, to ensure that the TDS concentrations in the receiving waters did not exceed certain levels that EPA believed, in view of the best scientific laboratory and field data at the time, were necessary to protect aquatic life.

In 1999, the Alaska Department of Environmental Conservation (ADEC) revised its state-wide water quality criterion for TDS, replacing the 1/3 above background criterion with a specific numeric criterion. AR 6 at 9. EPA approved the revised criterion on April 29, 2002. AR 11. Where aquatic life is the designated use, the revised criterion allows TDS concentrations up to 500 mg/l, or up to 1,000 mg/l if ADEC makes a site-specific determination that a concentration between 500 and 1,000 mg/l will be protective of aquatic life. AR 6 at 9, AR 11 at 1. In addition to the revised criterion, on July 16, 2003, EPA approved a site-specific criterion of 1,500 mg/l for TDS for certain water bodies. AR 60. The State § 401 Certification summarizes the criteria that apply to various water bodies near the Mine. AR 51, Appendix B. The Permit Modification at issue in this case implements these new TDS criteria. ADEC certified, under CWA § 401, that the Permit Modification complies with State water quality standards. AR 51.

Neither Petitioner nor any other party has challenged ADEC's adoption of the new TDS criterion, EPA's approval of it, or ADEC's certification of this Permit Modification, though there are legal mechanisms to challenge each of those actions. Petitioner does not contest that the Permit Modification accurately implements the new numeric criteria for TDS.

III. SCOPE AND STANDARD OF REVIEW

There is no appeal as of right from a Region's permitting decision. In re Miners Advocacy Council, 4 E.A.D. 40, 42 (EAB 1992). In any appeal, the petitioner bears the burden of demonstrating that review of the Region's decision is warranted. See 40 C.F.R. § 124.19(a);

see also In re Hecla Mining Company, Grouse Creek Unit, NPDES Appeal No. 02-02, slip op. at 13 (EAB, July 11, 2002); In re City of Moscow, Idaho, NPDES Appeal No. 00-10, slip op. at 9 (EAB, July 27, 2001); In re Commonwealth Chesapeake Corp., 6 E.A.D. 764, 769 (EAB 1997). For the EAB to grant review of an NPDES permit, the petition must demonstrate that the condition in question is based on "a finding of fact or conclusion of law which is clearly erroneous," or "an exercise of discretion or an important policy consideration which the [EAB] should, in its discretion, review." 40 C.F.R. § 124.19(a). See, e.g., Hecla, slip op. at 13; City of Moscow, slip op. at 8-9; In re City of Jacksonville, District II Wastewater Treatment Plant, 4 E.A.D. 150, 152 (EAB 1992). As stated in the preamble to 40 C.F.R. § 124.19, "this power of review should only be sparingly exercised," and "most permit conditions should be finally determined [by the permitting authority] . . . ." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). See In re Jett Black, Inc., 8 E.A.D. 353, 358 (EAB 1999); In re Maui Elec. Co., 8 E.A.D. 1, 7 (EAB 1998).

The petitioner must demonstrate to the Board "that any issues being raised were raised during the public comment period to the extent required by these regulations . . . ." 40 C.F.R. § 124.19(a). Participation during the comment period must have conformed to the requirements of NPDES permitting regulations, which require that all reasonably ascertainable issues and all reasonably available arguments supporting a petitioner's position be raised by the close of the public comment period. 40 C.F.R. § 124.13; see also, Hecla, slip op. at 14; City of Moscow, slip op. at 10; In re New England Plating, 9 E.A.D. 726, 732 (EAB 2001). As the Board has noted, the intent of this provision "is to ensure that the permitting authority has the first opportunity to address any objections to the permit, and that the permit process will have some finality." In re Sutter Power Plant, 8 E.A.D. 680, 687 (EAB 1999); see also In re Steel Dynamics, 9 E.A.D. 165,

229-30 (EAB 2000); In Re Encogen, 8 E.A.D. 244, 249-50 (EAB 1999). The Board has consistently stricken arguments submitted to the EAB that were not provided to the Agency during the public comment period. See, e.g., In re Caribe General Electric Products, Inc., 8 E.A.D. 696, 698 (EAB 2000).

Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate with specificity why the permitting authority's response to those objections is clearly erroneous or otherwise merits review. See In re Phelps Dodge Corp., NPDES Appeal No. 01-07, slip op. at 16-17 (EAB, May 21, 2002); In re Mille Lacs Wastewater Treatment Facility & Vineland Sewage Lagoons, NPDES Appeal Nos. 01-17 & 01-19 through 23 (EAB, Apr. 25, 2002); City of Moscow, slip op. at 9-10; In re Haw. Elec. Light Co., 8 E.A.D. 66, 71 (EAB 1998).

The EAB "assigns a heavy burden to petitioners seeking review of issues that are essentially technical in nature." Hecla, slip op. at 14-15; City of Moscow, slip op. at 9; In re Town of Ashland Wastewater Treatment Facility, 9 E.A.D. 661, 670 (EAB 2001); In re NE Hub Partners, L.P., 7 E.A.D. 561, 567 (EAB 1998), review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA, 185 F.3d 862 (3d Cir. 1999)). When presented with technical issues in a petition, the EAB determines whether the record demonstrates that "the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information in the record." Hecla, slip. op. at 15 (Permit appeal rejected on grounds that the flow limit set by the Region was rationally based on evidence in the record). If the EAB determines that the Region gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, the board typically gives

deference to the Region's position. NE Hub Partners, L.P., at 568, Hecla, slip. op. at 15; City of Moscow, slip op. at 11.

As discussed below, the Petitioner has not carried its burden to demonstrate that the Region's permit decision is based on a clear error of law or fact or raises important policy considerations meriting review. Therefore, Petitioner's request for review should be denied.

IV. ARGUMENT

The Petition sets forth four reasons supporting review of the Permit Modification. This Response addresses each of the four reasons in turn. The Petition should be denied because each of the reasons set forth in the Petition fails for one or more of the following reasons: (1) the issue was not raised during the public comment period; (2) the Petition merely restated issues raised during the comment period, without addressing or pointing to any deficiency in the Region's response to the comment; (3) the Petition challenges a regulatory action distinct from the Permit Modification (either a state water quality standard promulgation, and EPA approval of a state standard, or a state certification under CWA § 401) which may not be challenged in this proceeding; (4) the Petition challenges a technical conclusion by the Region that has a rational basis in the administrative record, and therefore which Petitioner has not established is clearly erroneous; (5) the Petition is based on an erroneous interpretation of the law.

A. Petitioner's Argument Regarding The ASTF Study

Petitioner's first reason supporting the petition, quoted in full, is that "The EPA's decision is not supported by substantial evidence, as the study EPA uses to support its in-stream TDS limit of 500 ppm demonstrates reduced fertilization rates in salmon at TDS concentrations as low as 250 ppm." Petition at 1 (citing AR 16, hereafter referenced as "ASTF Report"). The EAB should reject this basis of the Petition because (1) it merely repeats objections made during

the comment period without pointing to any error in the Region's response; (2) it is not a challenge to any permitting decision by the Region, but rather a challenge to the scientific basis of approved state water quality criteria, which is not an appropriate issue for this proceeding; and (3) it does not demonstrate any clear error in the Permit Modification decision.

1. The EAB Should Reject This Argument Because it Merely Repeats Objections Made During the Comment Period, Without Addressing the Region's Response to Comments Regarding This Issue.

As noted above in Part III (Scope and Standard of Review), for an issue to be subject to EAB review, it must be more than a mere restatement of an issue raised during the comment period; the Petitioner must "demonstrate why the Region's response to those objections is clearly erroneous or otherwise warrants review." In re Envotech, L.P., 6 E.A.D. 260, 268 (EAB 1996) (quoting In re LCP Chemicals - New York, 4 E.A.D. 661, 664 (EAB 1993)); In re Town of Ipswich Wastewater Treatment Plant, NPDES Appeal No. 00-19, slip op. at 23 (EAB, July 26, 2001); Town of Ashland at 670; In re Ash Grove Cement Co., 7 E.A.D. 387, 404 (EAB 1997); In re NPDES Permit for Wastewater Treatment Facility of Union Township, Michigan, NPDES Appeal No. 00-27 (Dec. 5, 2000), aff'd MDEQ v. EPA, 318 F.3d. 705 (6th Cir. 2003). In Ipswich, for example, the Town of Ipswich challenged EPA's omission from an NPDES permit of a compliance schedule that the Town had requested during the permit proceeding. Ipswich at 22. In the response to comments ("RTC"), the Region had addressed the compliance schedule request. Id. The EAB held that "[b]ecause the Town failed to show why the Region's RTC was clearly erroneous, we deny review of the Town's request for a compliance schedule." Id. at 23.

Similarly, in this case, this issue was raised during the comment period, and the Region responded in the Response to Comments. Petitioner objected to the Permit Modification's effluent limits for TDS during the comment period on the basis that "The ASTF Report found

reduced fertilization rates in salmon at TDS concentrations as low as 250 parts per million," AR 39 at 2-3. Earthjustice made similar comments, arguing that the ASTF Report "found that TDS levels of 250 ppm resulted in significantly lower fertilization rates," and on that basis questioning the Region's rationale for allowing 500 ppm TDS when and where spawning occurs. AR 41 at 1-2. The Region responded to these comments with extensive explanations of its interpretation of the ASTF Report, and its rationale for the permit limit in question in light of the ASTF Report. AR 62 at 1-3, 4-6. Yet the Petition merely restates that "The EPA's decision is not supported by substantial evidence, as the study EPA uses to support its in-stream TDS limit of 500 ppm demonstrates reduced fertilization rates in salmon at TDS concentrations as low as 250 ppm." Petition at 1 (quoting the Petition's argument on this issue in full, omitting only the citation to the ASTF Report). This is no more than a restatement of the comments submitted during the comment period. The Petition fails to refer to the extensive rationale that the Region provided during the comment period, let alone "show why the Region's RTC was clearly erroneous," and for that reason the Petition must be denied with respect to this issue. Ipswich at 23.

2. The EAB Should Reject This Argument Because it is not a Challenge to a Permit Condition, but Rather is a Challenge to Approved State Water Quality Standards, Which is Improper in a Permit Appeal.

The 500 ppm concentration that the Petitioner challenges is simply a straightforward application of an approved state water quality criterion that may not be challenged in this proceeding. AR 62 at 1-5, AR 26 at 6-8 and Appendix C. On April 29, 2002, EPA approved a revised state-wide water quality criterion for TDS, which ADEC had adopted on April 29, 1999. AR 11. Where aquatic life is the designated use, the revised criterion allows TDS concentrations

up to 500 mg/l.[6] AR 6 at 9, AR 11 at 1. The Permit Modification at issue in this case implements the new TDS criterion. ADEC certified, under CWA § 401, that the Permit Modification complies with State water quality standards. AR 51. Neither Petitioner nor any other party has challenged ADEC's adoption of the new TDS criterion, EPA's approval of it, or ADEC's certification of this Permit Modification, though there are legal mechanisms to challenge each of those actions. Petitioner does not deny that the Permit Modification's new TDS limits accurately implement the applicable criterion.

The EAB has made it clear that in a permit appeal proceeding, a petitioner may challenge a "condition of the permit decision," 40 C.F.R. § 124.19(a), but not "the validity of prior, predicate regulatory decisions that are reviewable in other fora," City of Moscow, slip. op. at 37 (citations omitted); see also City of Hollywood, Fla., 5 E.A.D. 157, 175-76 (EAB 1994), In re American Cyanamid Co., 4 E.A.D. 790, 796 (EAB 1993). The EAB "has thus denied in the context of NPDES permit appeals review of challenges to EPA's approval of state water quality standards." City of Moscow, slip. op. at 37, citing City of Hollywood, 5 E.A.D. at 175-76. Petitioner's first basis for the Petition is simply a challenge to the scientific validity of the applicable TDS criterion, but does not articulate any clear error that is within the scope of the Region's permitting decision,[7] and therefore must be rejected as a basis for this appeal.

3. The EAB Should Reject This Argument Because it Does Not Demonstrate that the Region Committed Clear Error.

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[6]See Part II.D and fn. 6, supra, for further discussion of the applicable state criterion.

[7]In the fourth reason articulated in the Petition supporting this challenge, Petitioner has made a separate argument as to why it believes the existing state water quality standards required the Region, in view of the ASTF Report, to impose a more stringent TDS limit in the Permit Modification. That argument is addressed below. This first reason articulated in the Petition contains no such argument, however, and should be rejected as a basis for Petition.

Even if the EAB considers this issue substantively, Petitioner has not demonstrated that the permit conditions in question fail to protect the designated use (aquatic life). As noted in the Region's response to comments, the ASTF Report reported adverse effects on fertilization for three species (king, coho, and pink salmon) at 250 mg/l; for three species (chum, steelhead, and Arctic char) the ASTF Report showed no adverse effects on fertilization at 500 mg/l. See AR 62 at 1-5.

The Permit Modification allows 500 mg/l TDS at times and places where four species may spawn: chum salmon, Dolly Varden, king (Chinook) salmon, and Arctic grayling. AR 15 at 15 (Table 4), AR 26 at 7 (Table 1), AR 62 at 1-5. The Region closely examined the various laboratory studies and field data to determine the effects of 500 mg/l TDS on the fish species present. AR 55. As the Region explained in its response to comments, for chum salmon, the ASTF Report showed no adverse effects on fertilization at 500 mg/l. AR 62 at 2, AR 55. Dolly Varden and Arctic Grayling were not addressed in the ASTF Report, but as the Region explained in the response to comments, field observations provided a reasonable basis for concluding that 500 mg/l TDS concentrations, where and when they are allowed by the Permit Modification, do not appear to impair those populations. AR 62 at 2-3 (Dolly Varden) and 4-5 (Arctic grayling), AR 55. Regarding king salmon, the Region explained in the response to comments both that the field data call into question whether there is truly king salmon spawning where and when the 500 mg/l concentration will occur, and also that the ASTF Report is not entirely clear that king salmon fertilization would be adversely affected at a TDS concentration of 500 mg/l. AR 62 at 3, AR 55. The Region articulated a rational basis in the administrative record for its decision; Petitioner has made no showing that the Region committed clear error, and therefore this basis

for the Petition must be rejected. Hecla, slip op. at 14-15; City of Moscow, slip op. at 9; Town of Ashland, slip op. at 10; NE Hub Partners at 567.

B. Petitioner's Argument Regarding 40 CFR §122.62(a) (FR notice of WQS change)

Petitioner's second reason supporting the Petition is that the Permit Modification does not comply with EPA regulations because the permittee did not request modification within 90 days after Federal Register notice of the action on which the request is based. 40 C.F.R. 122.62(a)(3). In this case, the modification was based on EPA approval, under Section 303(c) of the CWA, of revised Alaska water quality criteria. The EAB should reject this basis for the appeal because it merely repeats objections made during the comment period without pointing to any error in the Region's response, and because it is based on an erroneous interpretation of the applicable regulatory provision.

1. The EAB Should Reject This Argument Because it Merely Repeats Objections Made During the Comment Period, Without Addressing the Region's Response to Comments Regarding This Issue.

As noted above, for an issue to be subject to EAB review, it must be more than a mere restatement of an issue raised during the comment period; the Petitioner must "demonstrate why the Region's response to those objections is clearly erroneous or otherwise warrants review." See citations and discussion supra in Parts III and IV.A.1. During the comment period, a comment submitted by Earthjustice argued that the Permit Modification was not authorized by 40 C.F.R. § 122.62(a)(3) because the permittee did not request modification within 90 days after Federal Register notice of the action on which the request was based. AR 41 at 4. In the Response to Comments, EPA explained that

> EPA is required to publish new site-specific criteria in the Federal Register only if EPA promulgates the site-specific criteria for the State of Alaska. In this case, EPA is not promulgating the site-specific criteria, but rather is approving/disapproving DEC's adoption of the site-specific into its water quality standards regulations. EPA

> approval/disapproval of state water quality standards is not required to be published in the Federal Register. Therefore, the requirement that the "permittee requests modification . . . within ninety (90) days after Federal Register notice of the action on which the request is based" is not applicable to this action.

AR 62 at 7. Petitioner does not address the response or show why it "is clearly erroneous or otherwise warrants review," and therefore this basis for the Petition should be rejected. In re Envotech at 268; Town of Ipswich, slip op. at 23; Town of Ashland, slip op. at 11; Ash Grove Cement at 404.

2. The EAB Should Reject This Argument Because EPA's Permit Modification is Consistent with 40 C.F.R. 122.62(a)(3)(iii).

Even if the EAB decides to hear petitioner's argument on this issue, EPA's modification of the permit is consistent with § 122.62(a)(3). Section 122.62(a) describes several conditions under which NPDES permits may be modified, one of which is when regulations underlying the permit have been changed. 40 C.F.R. § 122.62(a)(3). Subsection 122.62(a)(3), in turn, provides three separate circumstances under which permits may be modified for this cause (changed regulations). 40 C.F.R. §§ 122.62(a)(3)(i), (ii) and (iii). The first, Subsection (a)(3)(i), is the focus of this argument in the Petition, and will be addressed in more detail below. The second, paragraph (ii), does not apply in this instance because it is based on judicial decisions that change the underlying regulation. The third, paragraph (iii), however, is directly applicable to the Permit Modification, and is completely overlooked in the Petition, although the Fact Sheet for the Permit Modification cites both authorities. AR 62 at 4.

Section 122.62(a)(3)(iii) provides that permits may be modified based on changed water quality standards in the case of "changes based on modified State certifications of NPDES permits" as provided in 40 C.F.R. § 124.55(b). Section 124.55(b) provides that

> If there is a change in the State law or regulation upon which a certification is based, . . . a State which has issued a certification . . . may issue a modified certification . . . and

> forward it to EPA. . . . If the certification . . . is received after final agency action on the permit, the Regional Administrator may modify the permit on request of the permittee . . . .

40 C.F.R. § 124.55(b). In this case, the state regulation upon which the original certification was based has indeed changed. AR 6 at 9, AR 53, AR 11, AR 60. ADEC has indeed modified its 401 certification based on the changed regulation. AR 51 ("[ADEC] has issued the enclosed [401 certification] to modify the requirements for discharge of Total Dissolved Solids (TDS) into Middle Fork of Red Dog Creek."). The permittee has indeed requested a permit modification based on the changes. AR 23. The conditions for modification under 40 C.F.R. § 122.62(a)(3)(iii) are therefore satisfied. This in itself is sufficient to warrant rejection of this basis for the petition, regardless of whether § 122.62(a)(3)(i) is satisfied; modification under § 122.62(a)(3) is warranted if either paragraph (i), (ii) or (iii) is satisfied.

3. The EAB Should Reject This Argument Because EPA's Permit Modification is Consistent with 40 C.F.R. 122.62(a)(3)(i).

Even if § 122.62(a)(3)(iii) did not apply, Petitioner's reading of § 122.62(a)(3)(i) is incorrect; the latter provision is a valid basis for the Permit Modification. Section 122.62(a)(3)(i) sets forth the following three conditions for a permit modification to be justified:

> (A) The permit condition requested to be modified was based on a promulgated effluent limitation guideline, EPA approved or promulgated water quality standards, or the Secondary Treatment Regulations under part 133; and
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> (B) EPA has revised, withdrawn, or modified that portion of the regulation or effluent limitation guideline on which the permit condition was based, or has appproved a State action with regard to a water quality standard on which the permit condition was based; and
>
> (C) A permittee requests the modification in accordance with § 124.5 within ninety (90) days after Federal Register notice of the action on which the request is based.

40 C.F.R. § 122.62(a)(3)(i). Petitioner contends that subparagraph (C) prohibits a permit modification based on a standards change that is not the subject of a Federal Register notice. That reading of this regulatory provision is incorrect.

This provision explicitly authorizes permit modifications not only in the case of changes in federal regulations, but also in the case of EPA approval of changes in State water quality standards. Subsection (A) of § 122.62(a)(3) explicitly authorizes permit modifications based on changes in any of four categories of regulations: promulgated effluent limitation guidelines, *EPA-approved water quality standards*, EPA-promulgated water quality standards, or Secondary Treatment Regulations. 40 C.F.R. § 122.62(a)(3)(i)(A) (emphasis added). Subsection (B) explicitly covers the situation where "EPA has revised, withdrawn, or modified" the underlying regulation, or where EPA "*has approved a State action* with regard to a water quality standard on which the permit condition was based." 40 C.F.R. § 122.62(a)(3)(i)(B) (emphasis added).

EPA promulgation of new or changed effluent limitation guidelines, water quality standards, or Secondary Treatment Regulations all must appear in the Federal Register. See 33 U.S.C. §§ 1314(b), 1314(d)(1), 1313(c)(4). EPA approval of state water quality standards are not, however, published in the Federal Register. See 40 C.F.R. § 131.21. Reading subparagraph (C) as Petitioner suggests creates an inconsistency with subparagraphs (A) and (B). If subparagraph (C) does indeed prohibit the exercise of § 122.62(a)(3)(i) when there is no Federal Register notice of the underlying regulation standards change, as Petitioner suggests, then that provision would never take effect in the event of an EPA-approved state standards change, because there would never be a Federal Register notice in that case. This reading would render meaningless the words in subsections (A) and (B) that explicitly allow this basis for permit modifications in the case of EPA-approved state water quality standards revisions.

Under accepted canons of construction, regulations must be interpreted as a whole, giving effect to each word, and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous. Rainsong Co. v.

FERC, 151 F.3d 1231, 1234 (9th Cir. 1998); In re Beckman Production Services, 8 E.A.D. 302, 310 (EAB 1998). The Petitioner's interpretation of subparagraph (C), therefore, is not favored at law, because it renders meaningless critical words in subparagraphs (A) and (B).

Subparagraph (C) can easily be harmonized with (A) and (B) if it is taken to impose the 90-day deadline *only* in the case of regulation changes *that are the subject of a Federal Register notice*. This makes sense on its face because the language used, "within ninety (90) days after Federal Register notice of the action on which the request is based," is more suggestive of a deadline for requesting the permit modification, rather than an affirmative requirement for a Federal Register notice, or a restriction on the applicability of this provision to only those regulatory changes that appear in a Federal Register notice.

Furthermore, this is the only interpretation that can be squared with the history of this regulatory provision. The proposed version of this regulation provided for permit modifications only in the event of changes to EPA-promulgated effluent guidelines, which are published in the Federal Register. 43 Fed. Reg. 37078, 37098 (August 21, 1978) (in the proposal, the provision was numbered § 122.31(e)). After taking public comment, EPA noted that "Several commenters suggested that withdrawal or revision of Water Quality Standards . . . should also constitute cause for permit modification. EPA agrees with these commenters and has revised § 122.31 accordingly." 44 Fed. Reg. 32854, 32869 (June 7, 1979). The record unequivocally establishes that EPA intended these provisions to authorize permit modifications based on state standards changes, which are not subject to Federal Register notices.

The only plausible reading of 40 C.F.R. § 122.62(a)(3)(i) that is consistent with this clear intent is that the deadline in § 122.62(a)(3)(i)(C) applies only to those regulation changes listed in § 122.62(a)(3)(i)(A) that are subject to Federal Register notices. Petitioner's interpretation of

subsection (C) would render meaningless the language in subsections (A) and (B) that explicitly allows for permit modification based on EPA approval of a State water quality standards revision. Since such actions are not required to be published in the Federal Register, a permittee could never request modification within 90 days of Federal Register notice. Such a result would contradict the clear intent of the regulation, as evidenced by the text and the regulatory history. This argument should be rejected as a viable reason for this petition.

C. Petitioner's Argument Regarding 33 USC §1342(o) (anti-backsliding)

Petitioner's third reason supporting the Petition is that the permit modification violates Section 402(o) of the Clean Water Act because it contains effluent limitations that are less stringent than the comparable limits in the previous permit. Petition at 3. The EAB should reject this reason supporting the Petition because (1) the issue was not raised during the public comment period, and (2) the Permit Modification is consistent with CWA Section 402(o).

1. The EAB Should Reject This Argument Because it Was Not Raised During the Comment Period.

As discussed above in Part III (Standard of Review), for an issue to be subject to review before the EAB, Petitioner must demonstrate that it was raised during the public comment period. 40 C.F.R. § 124.19(a) ("The petition shall include . . . a demonstration that any issues being raised were raised during the public comment period . . ."). Petitioner does not even attempt to make such a demonstration, and in fact this issue was not raised during the comment period. The Region therefore had no opportunity to address this issue during the Permit Modification proceeding, and the EAB should not consider this issue in this appellate proceeding. See cases cited supra in Part III (second paragraph).

2. The EAB Should Reject This Argument Because The Region's Modification of the Permit is Consistent with CWA Section 402(o).

Even if the EAB decides to hear petitioner's argument on this issue, EPA's modification of the permit is consistent with CWA Section 402(o). Section 402(o) provides, in relevant part, that "[i]n the case of effluent limitations established on the basis of section 301(b)(1)(C) or section 303(d) or (e), a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit *except in compliance with section 303(d)(4).*" 33 U.S.C. § 1342(o)(1) (emphasis added). Section 303(d)(4) contains two subsections: § 303(d)(4)(A), which applies to waters not meeting water quality standards, and § 303(d)(4)(B), which applies to waters whose quality "equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standard[s]." In this case, the receiving water is meeting the applicable water quality standard for TDS, which is the parameter underlying the contested effluent limit. AR 63 Attachment (water quality data, spawning dates), AR 11 (state-wide criteria), AR 60 (site-specific criterion). Furthermore, the record provides a rational basis for EPA's conclusion that that water quality is indeed protective of the designated uses. See Section IV.A.3 supra. Therefore, if § 303(d)(4)(B) is satisfied, § 401(o) allows the Permit Modification to impose a less stringent TDS limit than that contained in the Permit.

Under § 303(d)(4)(B), permit limits may be revised if such revision is "subject to and consistent with the antidegradation policy established under this section." 33 U.S.C. § 1313(d)(4)(B). Petitioner raises a separate argument that the Permit Modification fails to comply with the applicable antidegradation policy, Petition at 3-5, and that argument is addressed below in Section IV.D. Thus substantively, this reason for the Petition depends on the Petition's separate argument regarding antidegradation; if the Region is in compliance with the

applicable antidegradation policy, then it is in compliance with CWA § 402(o) (antibacksliding) as well.

D. Petitioner's Argument Regarding Alaska's Antidegradation Regulations

Petitioner's fourth reason supporting the Petition is that the Permit Modification does not comply with the State of Alaska's EPA-approved antidegradation regulations. Petition at 3-5. The provision of the Alaska antidegradation regulations that Petition alleges the Permit Modification violates is 18 AAC 70.105(a)(1), which provides, "It is the state's antidegradation policy that . . . existing water uses and the level of water quality necessary to protect existing uses must be maintained and protected . . . ." Id. The EAB should reject this basis of the Petition because Petitioner did not properly raise the issue in this appeal, because the State certified under CWA § 401 that the Permit Modification complies with State water quality standards (of which the antidegradation provision is a part), and because the Petition does not demonstrate that the Region failed to comply with the antidegradation regulations.

1. The EAB Should Reject This Argument Because this Issue was not Raised During the Comment Period.

As noted above in Section III (Scope and Standard of Review), to be entitled to EAB review regarding this issue, Petitioner must demonstrate that this issue was raised during the public comment period. 40 C.F.R. § 124.19(a). Petitioner asserts that "many commenters raised the issue of whether existing uses would be protected," Petition at 4, but makes no other reference to Alaska's antidegradation regulation being raised explicitly during the comment period. In fact, no commenter did explicitly raise that issue, depriving the Region of the opportunity to address this issue in the first instance prior to this appeal. The EAB has repeatedly rejected petitions based on issues that were touched upon tangentially, but not explicitly raised, during the public comment period. See, e.g., In re Florida Pulp & Paper Assoc., 6 E.A.D. 49, 54-

55 (EAB 1995) (comment regarding one aspect of testing of sludge required by a Clean Water Act permit was not sufficient to preserve for Appeal the general question of authority to require any sludge testing); In re Amoco Oil Co., 4 E.A.D. 954, 975 (EAB 1993) (argument regarding whether the EPA needed information that was required to be provided as a RCRA permit condition was not preserved for review where comment only raised issue regarding burden of proving the information); In the matter of Pollution Control Industries of Indiana, Inc., 4 E.A.D. 162, 166-69 (EAB 1992) (comments on two particular aspects of testing requirement of a Resource Conservation and Recovery Act permit were not sufficient to raise general objection to any testing requirement). In this case, although several commenters questioned whether the Permit Modification adequately protected designated uses, and the Region responded in detail to those comments, no commenter explicitly raised the issue of whether the Region properly applied the Alaska antidegradation regulation, thus this issue was not adequately raised during the public comment period, and this argument is not a legitimate basis for the Petition.

In the alternative, if the EAB deems the comments generally addressing protection of uses to have adequately raised this antidegradation issue during the comment period, then this argument is not a valid basis for the Petition because the Region responded to those general comments, and Petitioner has neither addressed the Region's responses nor shown why they are inadequate. Petitioner does mention the Response to Comments, but only addresses the Region's discussion regarding the State's 401 certification. Petition at 3-4. However, the Petition does not address whatsoever the Region's extensive discussion in the Response to Comments regarding the issue of whether the effluent limits in the Permit Modification adequately protected fish fertilization, see, e.g., AR 62 at 1-6, 11-14, which is the crux of Petitioner's complaint regarding the Permit Modification's protection of designated uses, Petition at 4-5. Nowhere in the Petition

does Petitioner address these responses or show why they are inadequate, although they respond directly to the Petitioner's argument that the conditions in the Permit Modification do not protect designated uses, and therefore that the Region has not complied with the Alaska antidegradation regulations. The EAB should therefore reject this argument for the reasons and based on the authorities set forth above in Sections III and IV.A.1.

2. The EAB Should Reject This Argument Because the State Certified, Under CWA § 401, that the Permit Modification Complied with State Water Quality Standards, of which the Antidegradation Provisions are a Part.

The State certified under CWA § 401 that the Permit Modification satisfied state water quality standards, which include the antidegradation provision raised in the petition. AR 51 (first page after cover letter) ("[ADEC] certifies that there is reasonable assurance that the activity and the resulting discharge is in compliance with the requirements of . . . 18 AAC 70."), AR 54. EPA may not impose a more stringent limitation than that certified as adequate by the State absent a showing of clear error in the State's certification. In re Ina Road Water Pollution Control Facility, 2 E.A.D. 99, 100-01 (CJO 1985). Petitioner makes no showing that the State's 401 certification is in clear error.

3. The EAB Should Reject This Argument Because Petitioner Does Not Demonstrate that the Region Committed Clear Error in Finding that the Permit Modification Protected the Designated Use.

As explained in Section IV.A.3 above, the Region explained in detail in its Response to Comments a rational basis, based on the administrative record, for concluding that the designated use is protected at the TDS concentrations allowed by the Permit Modification. This basis for the Petition must be rejected because Petitioner fails to demonstrate that the Region committed clear error. Hecla, slip op. at 14-15; City of Moscow, slip op. at 9; Town of Ashland, slip op. at 10; NE Hub Partners, L.P., 7 E.A.D. at 567 (EAB 1998).

V. CONCLUSION

Petition should be dismissed because it does not satisfy the minimum requirements of § 124.19(a), which requires the Petition to include (1) "a demonstration that any issues being raised were raised during the public comment period," (2) and either (i) "a finding of fact or conclusion of law which is clearly erroneous," or (ii)" an exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review." Furthermore, the Petition may not rely on mere restatements of comments submitted and responded to by the Region during the comment period; the Petition must raise deficiencies in the Region's responses to issues raised during the comment period.

The Petition presents four reasons supporting review, and none meets those minimum requirements. All four reasons given in the Petition either were not raised at all during the comment period, or merely repeat issues that were raised during the comment period and to which the Region responded in the response to comments.

In addition, the first and fourth reasons given fail to identify any findings of fact or conclusions of law that are clearly erroneous, because those two arguments in reality are challenges to the adequacy of promulgated and approved state criterion, not challenges to the permitting action that may be reviewed in this forum. Even if those two arguments were proper for this forum, the record provides a rational basis, based on the administrative record and explained in the responses to comments, for concluding that the permit conditions implementing the state criteria are protective of the uses. The second and third reasons given are based on incorrect interpretations of the governing regulations, and thus fail to show that the Region's decision was clearly erroneous.

Since all four of the reasons given fail to satisfy the requirements for a petition as set forth in 40 C.F.R. § 124.19(a), the Petition should be dismissed.

Dated this 14th day of October, 2003.

Respectfully submitted,

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